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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL VEGA,

Defendant and Appellant.

F056904

(Super. Ct. No. MF008439A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Cory J. Woodward, Judge.

Alex Green, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Louis M. Vasquez and Lloyd G. Carter, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Manuel Vega appeals from a sentence of six years for felony elder abuse. He contends that the trial court should have *sua sponte* instructed the jury on the legal definition of the word “likely” as it is used in the phrase “likely to produce great bodily harm” contained in CALCRIM No. 830 (felony elder abuse). He also contends that the trial court erred in denying his motion for a new trial because of juror misconduct. Finally, he contends that the trial court erred in imposing two fines pursuant to Government Code section 70373. For the following reasons, we affirm the convictions and remand to the trial court to strike the two fines.

STATEMENT OF THE CASE

On November 3, 2008, the Kern County District Attorney filed an information charging appellant with felony elder abuse (Pen. Code, § 368, subd. (b)(1)--count 1),¹ felony assault with a deadly weapon (§ 245, subd. (a)(1)--count 2), and misdemeanor resisting arrest (§ 148, subd. (a)(1)--count 3).

On December 22, 2008, the district attorney moved to amend the information to charge a “strike” prior as to counts 1 and 2. On December 29, 2008, the trial court granted the request.

On January 2, 2009, the trial court dismissed count 2 on its own motion and denied the district attorney’s motion to amend the information.

On the same date, the jury began its deliberations and returned a verdict in 30 minutes. Before the verdict was read, juror 1548160 informed the court that she had seen juror 1707013 speaking with two of the prosecution’s witnesses. Out of the presence of the other jurors, the court and counsel questioned juror 1707013, who admitted speaking with two of the witnesses. Juror 1707013 denied talking about the case with the witnesses, and stated that she had met them at a party a “long, long time ago.” She did

¹ All further section citations are to the Penal Code, unless otherwise stated.

not “remember their name[s],” but considered herself on a “social friendly basis” with them. Juror 1707013 also denied telling any of the other jurors about a comment made by one of the witnesses that indirectly referred to appellant’s character. Appellant moved for a new trial, which the trial court denied.

The court then dismissed juror 1707013 for misconduct, and an alternate juror was substituted in her place. The judge ordered the jury to disregard all past deliberations and to begin deliberations anew, with the full participation of the alternate juror. The jury retired to deliberate on the verdict. Thirty-five minutes later, the jury returned a verdict. Appellant was found guilty on counts 1 and 3. Appellant waived his right to a jury as to his prior conviction, and the court found the prior to be true.

On January 15, 2009, appellant’s motion to strike his prior conviction was denied. Appellant was sentenced to the midterm sentence of three years for his conviction on count 1, which was doubled due to his prior strike (§ 667, subd. (e)), for a total of six years in state prison. Appellant also was sentenced to 183 days for his conviction on count 3, to run concurrently.

On January 15, 2009, appellant timely filed his notice of appeal.

STATEMENT OF THE FACTS

On September 15, 2008, Louis Escobar and Manuel Vega were drinking beer at the house of Escobar’s girlfriend, Carmen Meyers. Escobar had known Vega for about three years. Around 5:45 p.m., the two men told Meyers that they were leaving for the liquor store to get more beer.

The two men were walking down Rosamond Boulevard when they saw an old man, who was later identified as 84-year-old Leo Colange. Vega then asked Escobar, “Do you want to see me hit this old man?” Escobar dared Vega to do so because he did not “think [appellant] would do it.” Vega did not say anything to Colange before he hit him. Escobar testified that he saw Vega hit Colange who appeared “maybe like 70, 75” in the head or the chest. Escobar answered affirmatively when asked if he could clearly

tell the victim was an old man and that the victim could not defend himself. Escobar and Vega began running to the liquor store following the assault. They realized, however, that witnesses had observed them, so they “jumped [a] couple of fences” and went back to the house where they had been drinking. When the police later showed up at the house, Escobar was detained along with Vega but released after being questioned.

On that night, Colange had been walking near his house on Rosamond Boulevard when he noticed Vega, whom he had never seen before, walking toward him. A taller man, who was identified as Escobar, was standing back. As Vega got closer to him, Colange felt threatened. Feeling that something was wrong, Colange took a step forward, toward Vega, because he used to box when he was 13 or 14 years old and learned a defensive maneuver of stepping into your opponent’s punch to avoid the full force of the blow. Vega took a swing at Colange’s head, but because Colange had stepped in toward him, it hit the back of his head. Colange went down on his right knee, and he felt disoriented. Although he did not feel pain on contact, he could not regain his balance for a couple of hours.

After punching Colange, Vega just stood there for a while. A crowd began to gather, and Vega and Escobar fled.

Colange then returned to his house. As he walked into his kitchen, his hand rubbed against a coarse table, and it nipped off the skin near a vein. His hand started bleeding heavily, running onto his pants and on the floor, but it took him a few minutes to realize where the blood was coming from. He then went back outside because he knew that there would be people outside to help him. A deputy sheriff, who had been dispatched to the scene, called for medical aid. Colange was treated at the hospital and released the same day without having his head or knee examined.

DISCUSSION

I. Jury Instruction

Appellant contends that the trial court prejudicially erred when it failed to *sua sponte* instruct the jury on the legal definition of the word “likely” as it is used in the phrase “likely to produce great bodily harm” in CALCRIM No. 830. He contends that, if the jury had been properly instructed, he would have only been convicted of misdemeanor elder abuse instead of felony elder abuse. We disagree.

Under section 368, “the difference between felony elder abuse and misdemeanor elder abuse is whether the abuse is perpetrated ‘under circumstances or conditions *likely* to produce great bodily harm or death.’” (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1334-1335, emphasis added.) A trial court has a general duty to instruct the jury *sua sponte*, including amplifying or clarifying terms in the instructions which have a “‘particular and restricted meaning,’” or have a “technical meaning peculiar to the law or an area of law.” (*People v. Roberge* (2003) 29 Cal.4th 979, 988.) A word or phrase has a “technical, legal meaning requiring clarification by the court” when it “has a definition that *differs* from its nonlegal meaning.” (*People v. Estrada* (1995) 11 Cal.4th 568, 574.)

In this case, appellant contends that the jury should have been instructed that the word “likely” means a “*substantial danger*” or a “*serious and well-founded risk*” that the appellant’s punch would result in great bodily harm to Colange. (See *People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204 (*Wilson*) [holding that “‘likely’ as used in section 273a [the felony child abuse statute] means a substantial danger, i.e., a serious and well-founded risk, of great bodily harm or death.”].) Because the jury was not so instructed, appellant contends that the jury likely would have applied “a definition allowing a conviction on a lesser standard of probability rather than the correct definition of ‘a substantial danger, i.e., a serious and well-founded risk ... of great bodily harm or death.’” We disagree.

Contrary to appellant's argument, the jury was properly instructed. The jury was given CALCRIM No. 830, which correctly states the law on felony elder abuse. The jury was not given any instruction on the definition of the word "likely." Also, appellant did not request that the jury be instructed on appellant's definition of the word "likely." Appellant is seeking a pinpoint instruction that amplifies a term used in a statute and not an instruction on a legal principle. In the absence of a specific request or objection to CALCRIM No. 830 by appellant, he has forfeited any claim of error. (See *People v. Rocha* (1978) 80 Cal.App.3d 972, 978 ["[D]efendant's failure to request additional or clarifying instructions constitutes a waiver of the right to complain of such omission for the first time on appeal."].)

In support of his argument, appellant relies on *Wilson, supra*. We are not convinced. *Wilson* addresses the felony child abuse statute, not the felony elder abuse statute. Moreover, *Wilson* has already been criticized in a decision from another appellate court. (See *People v. Chaffin* (2009) 173 Cal.App.4th 1348, 1351-1352 ["Case law has long recognized that the phrase 'likely to produce great bodily harm or death' in section 273a [the felony child abuse statute] means "the probability of serious injury is great.""]].) Thus, the trial court was not under any duty to sua sponte instruct the jury on the meaning of the word "likely."

In any event, any instructional error was harmless. We review instructional errors such as this under the *Watson* reasonable probability of a more favorable result standard of review.² (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130 [holding that an instructional error that is not of constitutional dimension is reviewed under the *Watson* test].) However, even under the *Chapman* harmless beyond a reasonable doubt standard of review, under the facts of this case, the error was harmless.³ (*People v. Sakarias*

² *People v. Watson* (1956) 46 Cal.2d 818, 836.

³ *Chapman v. California* (1967) 386 U.S. 18, 24.

(2000) 22 Cal.4th 596, 624-625 [holding that an instructional error of constitutional dimension, such as removing an element of a crime from a jury's consideration, is reviewed under the *Chapman* test].)

Appellant hit an 84-year old man in the head, knocking him down and causing him to be disoriented for several hours. No reasonable jury could have concluded anything other than that such a blow was “likely,” under any definition of that word, to cause great bodily harm. Therefore, under the facts of this case, we find beyond a reasonable doubt that the jury would have convicted appellant of felony elder abuse, even if the jury had been instructed as appellant suggests. Accordingly, appellant's claim of error is rejected.

II. Juror Misconduct

Appellant also contends that the trial court erred in denying his motion for a new trial because of juror misconduct. He contends that the trial court abused its discretion in not questioning the other jurors to determine whether juror 1707013's misconduct tainted them. He further contends that the trial court's decision not to conduct a further inquiry of the other jurors deprived him of his constitutional right to an impartial jury. We disagree.

A. Factual Background

Juror 1707013's misconduct was brought to the attention of the trial court by juror 1548160. Outside of the presence of the other jurors, the trial judge spoke to juror 1548160 who stated that she had seen a fellow juror speaking with two of the witnesses, later identified as Escobar and Meyers, after jury duty on a previous day. She stated that she saw the “girls” passing a cell phone back and forth, and thought that she saw them catching a ride together. Juror 1548160 stated that she was not sure of what she saw, but “[l]ater in the jury room after we had returned a verdict and we were talking about small towns and knowing people, and I asked [juror 1707013] if she knew anybody and she said that she had hung out with two of the witnesses once or twice and I asked her why she

hasn't said something -- anything or -- during the questioning." Juror 1548160 identified juror 1707013 as the person that she had seen talking to the witnesses and passing a cell phone back and forth with the female witness, Meyers.

At that point, the trial judge instructed juror 1548160 to return to the jury room and not to discuss the matter with the other jurors.

Juror 1707013 then was brought in before the trial judge and attorneys, outside the presence of other jurors. The trial judge questioned juror 1707013 about her alleged communication with two of the witnesses. Juror 1707013 stated that she did not know the witnesses on a "regular basis" and that she "mainly know[s] of them" but she "didn't remember their name[s]" when the court mentioned them. She stated that she only knew them by face. She described her relationship with the two witnesses as on "a social friendly basis." She stated that she had met them once or twice at one of her friend's parties "a long, long time ago" and had only met them "once or twice" in her life, the last time before the trial being "maybe last year."

The trial judge then questioned juror 1707013 about the reported incident, and about the extent of her contact with the witnesses during trial. Juror 1707013 stated that the witnesses saw her after jury duty and offered her a ride home, which she accepted. The court then made the following line of inquiry:

"THE COURT: Now, did you talk about the case with them?

"JUROR (1707013): No. I told them that they were not allowed to discuss stuff.

"THE COURT: Okay. So did they talk about it while you were present?

"JUROR (1707013): No, they didn't really.

"THE COURT: I heard you say, 'not really.' What do you mean by not really?

"JUROR (1707013): They didn't say anything about what happened or anything. He said that he was just -- they said that -- she said that he

needs to choose [a] better choice of friends; that's what she said. They didn't really discuss the case -- they didn't discuss the case.

“THE COURT: Well, when the girlfriend said you need to have a better choice of friends, what did Mr. Escobar say?”

“JUROR (1707013): He was just like, yeah.”

The court also questioned juror 1707013 about the extent of her contact with the other jurors:

“THE COURT: Either way I am not -- I don't want to know, because I don't know what the verdict was, but either way apparently when you were talking back there --

“JUROR (1707013): No.

“THE COURT: -- you didn't share anything that you knew about them from the past?

“JUROR (1707013): No.

“THE COURT: Did you share any of that information with the jurors?

“JUROR (1707013): What do you mean?

“THE COURT: Did you tell them, hey, I know these people from the past or that we were talking -- I was talking with them the other day? [¶] Did you talk about that in the deliberation room with the other jurors?

“JUROR (1707013): No. I just told -- I told them I live in there, in Rosamond. I told the lady next to me. I told her that after the -- after the fact when I seen [sic] them that I knew who they were -- not knew [them] personally, but I know, you know, them by their looks.

“THE COURT: All right. Okay. All right. [¶] Mr. Jabury [defense counsel], did you have anything that you wanted to ask?

“MR. JABURY: So did they generally speak in a negative tone towards Mr. Vega?

“JUROR (1707013): No, they didn't even talk anything about him.

“MR. JABURY: She [Meyers] did make the comment about hanging out with [a] better group of friends.

“JUROR (1707013): She just said that you should choose your friends -- should choose [a] better group of friends, I guess, to hang out with; that’s all she said.

“THE COURT: All right. Anything else, Mr. Jabury?

“MR. JABURY: No.

“THE COURT: Ms. Rogers [prosecutor]?

“MS. ROGERS: No comments, your Honor.

“THE COURT: Okay. Now, when you told them I cannot talk about the case, did anybody discuss the case anymore after that?

“JUROR (1707013): No.”

The court then sent juror 1707013 back to the jury room. The judge stated:

“It seems that there is -- at this point, of course, we have some contact with something being said, at least -- or reference being made by the girlfriend about Mr. Vega to this particular juror. [¶] We have one option that I think of either finding that it did not effect [*sic*] the deliberations or second option of substituting another juror in and have them begin deliberations again. It does not appear that she shared any of the information with the other 12, so I don’t think it harms the entire panel, but the third option is, I guess, we could have -- we could set this all over until 1:30 [p.m.] and have everybody come back, and if you want to give it some thought as to what to do or any challenges you wish to make, we could take it up ... then.”

The trial court decided to follow the third option. When the jurors were called back in, the foreperson announced that they had a verdict. However, the court informed them that a problem had arisen, and instructed them to return after the noon recess. To counsel, the trial court commented, “... [I]t seems to me just given some more thought that this appears to perhaps not to have had any impact on the jury’s verdict.” Nonetheless, the court noted that “the only redress would be excusing her and substituting in deliberating juror,” relying on *People v. Pierce* (1979) 24 Cal.3d 199.

After the noon recess, defense counsel moved for a mistrial on the ground that “[w]e have no way of knowing how tainted the jury pool is. I believe the Court has to take the conservative position and assume it’s been tainted.” The motion was denied. The trial court then considered the remaining options:

“... [N]umber one, that would be to conduct little further inquiry which would include possibly calling the other jurors in to decide -- well, no. Let’s disregard about calling the other jurors, because the question -- let me rephrase it. Let me start it again. [¶] The purpose of calling any other jurors in would be to determine whether Ms. (1707013) had made any comments during the deliberations one way or the other negatively towards perhaps the character of Mr. Vega. Assuming that she did not, we’ll assume -- if we assume that she did, then the question would be whether that had any impact on each juror’s mind. [¶] Then assuming that she did not, then the question would be whether it impacted Ms. (1707013) over a long term and some of that would depend on a number of issues, such as I do note that the jury deliberations are very quick, I think easily within 20 minutes. Okay.”

The trial court then brought back juror 1707013 and asked her whether she had made any comments or participated in the jury deliberations. Juror 1707013 stated, “I said that -- I said that ... Rosamond is a small town, and yeah, I might have like said some stuff, yeah.” Upon further questioning, juror 1707013 stated, “Well, I said stuff about misdemeanor and felony and I said that I seen [*sic*] -- that I seen [*sic*] the witnesses somewhere before,” and that she had “seen them around town.” Juror 1707013 denied saying anything more about the witnesses, about riding home with them, or Meyers’s statement to Escobar about choosing a “better friend.”

The trial court then released juror 1707013 from jury duty, substituted the alternate juror, and ordered the new jury to “set aside and disregard all past deliberations” and begin deliberations all over again. The new jury returned a verdict within 35 minutes.

B. Standard of Review

Recently, the California Supreme Court summarized the state of the law on a motion for new trial because of alleged juror misconduct. According to our state Supreme Court,

“[t]he trial court is vested with broad discretion to act upon a motion for new trial. [Citation.] When the motion is based upon juror misconduct, the reviewing court should accept the trial court’s factual findings and credibility determinations if they are supported by substantial evidence, but must exercise its independent judgment to determine whether any misconduct was prejudicial. [Citations.] A juror’s receipt or discussion of evidence not submitted at trial constitutes misconduct. [Citation.] Juror misconduct raises a rebuttable presumption of prejudice; a trial court presented with competent evidence of juror misconduct must consider whether the evidence suggests a substantial likelihood that one or more jurors were biased by the misconduct. [Citation.]

“The trial court has discretion to determine whether to conduct an evidentiary hearing to resolve factual disputes raised by a claim of juror misconduct. [Citation.] ‘Defendant is not, however, entitled to an evidentiary hearing as a matter of right. Such a hearing should be held only when the court concludes an evidentiary hearing is “necessary to resolve material, disputed issues of fact.” [Citation.] “The hearing ... should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties’ evidence presents a material conflict that can only be resolved at such a hearing.” [Citations.]’ [Citation.] The trial court’s decision whether to conduct an evidentiary hearing on the issue of juror misconduct will be reversed only if the defendant can demonstrate an abuse of discretion. [Citations.]” (*People v. Dykes* (2009) 46 Cal.4th 731, 809-810, fn. omitted.)

C. Analysis

Here, the trial court concluded that juror 170713 committed misconduct when she had contact with two of the prosecution’s witnesses and heard a remark from Meyers that could be inferred as casting a negative light on appellant’s character. The trial court determined that any harm could be cured by dismissing juror 1707013, substituting an

alternative juror, and ordering the jury to conduct deliberations anew. The trial court also determined, after questioning juror 1707013, that juror 1707013 did not taint the other jurors because juror 1707013 only mentioned that she had seen the witnesses around town. The trial court found or impliedly found that juror 1707013 did not tell the other jurors that she rode home with the jurors or that she passed along Meyers's comment that Escobar should have chosen better friends than appellant. This is a factual finding on the issue of the credibility of juror 1707013's testimony, and it is supported by substantial evidence in the record. The testimony of juror 1548160 is that she learned from juror 1707013 that juror 1707013 had a prior social relationship with the witnesses and that juror 1707013 caught a ride home with the witnesses. However, juror 1548160 did not indicate that juror 1707013 informed her or the other jurors about any of Meyers's comments. Further, juror 1548160 told the court that she had discussed the witnesses' relationship with juror 1707013 only after deliberations had finished. There is no indication in the record that juror 1707013 relayed any comments by Meyers to any other juror. Moreover, it is undisputed that no other juror had contact with the prosecution's witnesses or engaged in other forms of juror misconduct. There is no substantial likelihood that the jurors were biased by the facts that juror 1707013 knew two of the prosecution's witnesses and that she caught a ride home with them. On this record, we conclude that the trial court did not abuse its discretion when it declined to conduct a further inquiry of the other jurors and declined to grant appellant's motion for a new trial.

Our conclusion is supported by the California Supreme Court's observation that "trial courts should use caution when making inquiries because of the need to protect the sanctity and secrecy of jury deliberations." (*People v. Bennett* (2009) 45 Cal.4th 577, 624; see also *People v. Bell* (2007) 40 Cal.4th 582, 618 [in a case where a juror raised the issue of intimidation but later retracted the claim, and after interviewing two of the jurors who allegedly intimidated the juror, the court concluded that "[a]s to other jurors' views of whether intimidation had occurred, the trial court acted within its sound discretion in

concluding that further questioning would be an unwarranted intrusion into the secrecy of jury deliberations.”].)

We also conclude that appellant was not denied a right to an impartial jury because the jurors were not tainted by juror 1707013’s misconduct.

III. Fines Under Government Code Section 70373

Finally, appellant contends that the trial court erred when it imposed two \$30 fines pursuant to Government Code section 70373. Appellant asserts that this court must strike the fines because his offenses occurred on September 15, 2008, before the January 9, 2009, enactment of Government Code section 70373. The People agree and join in the request to strike the two fines.

DISPOSITION

The judgment is modified to strike the two fines imposed pursuant to Government Code section 70373. As modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting this modification and to send a certified copy of the amended abstract of judgment to the appropriate authorities.

Levy, J.

WE CONCUR:

Wiseman, Acting P.J.

Kane, J.